No. 118585

IN THE SUPREME COURT OF ILLINOIS

IN RE: PENSION LITIGATION	)	Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois,
	)	Sangamon County Case Nos. 2014 MR 1, 2014 CH 3, and 2014 CH 48; Cook County Case No. 2013 CH 28406; and Champaign County Case No. 2014 MR 207 (consolidated pursuant to Supreme Court Rule 384)
	)	The Honorable John W. Belz, Judge Presiding

BRIEF OF *ISEA*, *RSEA*, *HEATON* AND *HARRISON*
PLAINTIFFS-APPELLEES

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ORAL ARGUMENT REQUESTED

No. 118585

IN THE SUPREME COURT OF ILLINOIS

IN RE: PENSION LITIGATION	)	Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois, Consolidated as No. 2014 MR 1, The Honorable John W. Belz, Judge Presiding.
DORIS HEATON, PAMELA KELLER, KENNETH LEE, HATTIE DOYLE, JOHN SAWYER III, Ed.D., LANCE LANDECK, KYLE THOMPSON, and MICHAEL SCHIFFMAN, on behalf of themselves and a class of similarly situated persons, Plaintiffs-Appellees, v. PAT QUINN, in his capacity as Governor of the State of Illinois, JUDY BAAR TOPINKA, in her capacity as Comptroller of the State of Illinois, and THE BOARD OF TRUSTEES OF THE TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS, Defendants-Appellants.	)	Originally Filed as Cook County Case No. 2013 CH 28406

RETIRED STATE EMPLOYEES ASSOCIATION, an Illinois not-for-profit corporation, and LAWRENCE WORT, GLADYS HAJEK, LINDA GUELDENER, AND MAURINE RICHTER, for themselves and on behalf of a class of persons similarly situated, Plaintiffs-Appellees, v. PATRICK QUINN, in his capacity as Governor of the State of Illinois, JUDY BAAR TOPINKA, Comptroller of the State of Illinois, DAN RUTHERFORD, Treasurer of State of Illinois, and THE BOARD OF TRUSTEES OF THE STATE EMPLOYEES RETIREMENT SYSTEM, Defendants-Appellants.	Originally Filed as Sangamon County Case No. 2014 MR 1
ILLINOIS STATE EMPLOYEES ASSOCIATION RETIREES, ROBERT SILGER, GWENN KLINGLER, BARBARA SCHOB, BARBARA MAXEINER, and JOHN MUNDSTOCK, on behalf of a Class of Persons Similarly Situated, Plaintiffs-Appellees, v. THE BOARD OF TRUSTEES OF THE STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS, THE BOARD OF TRUSTEES OF THE GENERAL ASSEMBLY RETIREMENT SYSTEM, THE BOARD OF TRUSTEES OF THE STATE TEACHERS' RETIREMENT SYSTEM, THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY RETIREMENT SYSTEM, JUDY BAAR TOPINKA, Comptroller of the State of Illinois, and DAN RUTHERFORD, the Treasurer of the State of Illinois, Defendants-Appellants.	Originally Filed as Sangamon County Case No. 2014 CH 3

GWENDOLYN A. HARRISON, GARY F. KROESCHEL, CHRISTINE M. BONDI, JULIE A. YOUNG, STEPHEN C. MITTONS, MONICA S. BUTTS, GARY L. CIACCIO, THOMAS W. TATE, JOSE M. PRADO, EDWARD F. CORRIGAN, CARYL E. WADLEY-FOY, ELLEN M. LARRIMORE, LEE A. AYERS, JAMES J. SHERIDAN, J. TODD LOUDEN, KENNETH N. DUGAN, JENNIFER L. EDWARDS, D'ANN URISH, JAMES P. HERRINGTON, TERRI L. GIFFORD, MICHAEL E. DAY, DENISE M. FUNFSINN, ELAINE G. FERGUSON, MARLENE M. KOERNER and DAVID L. BEHYMER, for themselves and on behalf of a class of all persons similarly situated, and WE ARE ONE ILLINOIS COALITION, Plaintiffs-Appellees, v. PATRICK QUINN, not individually but solely in his capacity as Governor of the State of Illinois, JUDY BAAR TOPINKA, not individually but solely in her capacity as Comptroller of the State of Illinois, DAN RUTHERFORD, not individually but solely in his capacity as Treasurer of the State of Illinois, TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS, BOARD OF TRUSTEES OF THE TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS, STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS, BOARD OF TRUSTEES OF THE STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS, STATE UNIVERSITIES RETIREMENT SYSTEM OF ILLINOIS, and BOARD OF TRUSTEES OF THE STATE UNIVERSITIES RETIREMENT SYSTEM OF ILLINOIS, Defendants-Appellants.	Originally Filed as Sangamon County Case No. 2014 CH 48

STATE UNIVERSITIES ANNUITANTS ASSOCIATION, DOMINIC "NICK" AREND, JOYCE BEASLEY, BRUCE BUSBOOM, OLIVER CLARK, AIMEE DENSMORE, MARCIA HAMOR, MAUREEN MCCORD, RICHIE PANKAU, BRUCE REZNICK, AND YVONNE SERGENT, Plaintiffs-Appellees, v. STATE UNIVERSITIES RETIREMENT SYSTEM, PATRICK QUINN, Governor of the State of Illinois, JUDY BAAR TOPINKA, Comptroller of the State of Illinois, and DAN RUTHERFORD, Treasurer of the State of Illinois, Defendants-Appellants.	)	Originally Filed as Champaign County Case No. 2014 MR 207

BRIEF OF *ISEA*, *RSEA*, *HEATON* AND *HARRISON*
PLAINTIFFS-APPELLEES

ORAL ARGUMENT REQUESTED

TABLE OF POINTS AND AUTHORITIES

NATURE OF THE ACTION

The plaintiffs allege that Public Act 98-0599 diminishes the pension benefits of members of State retirement systems in violation of the Pension Protection Clause (Article XIII, §5) of the Illinois Constitution, which provides that such benefits "shall not be diminished or impaired." The defendants admit that the Act diminishes pension benefits. Their sole defense is that the Pension Protection Clause contains an implied or unstated exception that would allow the General Assembly to diminish pension benefits as an exercise of its police powers or reserved sovereign powers. The parties filed cross-motions for summary judgment on the issue of whether the Pension Protection Clause contains such an implied or unstated exception. Ruling on those dispositive motions, the circuit court held that the Pension Protection Clause contains no such exception. The circuit court held that the Act is unconstitutional, found the Act inseverable, and awarded judgment to the plaintiffs. The issue of whether the Pension Protection Clause contains an applicable exception is raised on the pleadings.

ISSUES PRESENTED

1. Does the Pension Protection Clause (Article XIII, §5) of the Illinois Constitution contain an implied or unstated exception that would permit the General Assembly to diminish the pension benefits of members of State retirement systems as a claimed exercise of police powers or reserved sovereign powers?

2. Assuming that the Pension Protection Clause contains no such implied or unstated exception, are the unconstitutional provisions of Public Act 98-0599 severable from the Act's remaining provisions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The defendants' appendix includes only two provisions of the Act: (1) its

"legislative statement," and (2) its "severability and inseverability" provision. A16-A18 (capitalization omitted). The defendants omitted the Act's provisions which diminish pension benefits. To remedy this oversight, the plaintiffs include the entire Act in their separate Supplemental Appendix. Public Act 98-0599 (annexed to Plaintiffs-Appellees' Supplemental Appendix ("SA") at 63-389). To facilitate review by this Court, this brief cites to the Act in the separate Supplemental Appendix, providing page numbers that are not included in the Act as enrolled.

INTRODUCTION

When the drafters of the Illinois Constitution adopted a stand-alone clause specifically protecting public pensions, they had this very sort of case in mind. They wanted to ensure that public workers would receive promised pension benefits, regardless of fiscal circumstances. To that end, the drafters included within the Pension Protection Clause a provision prohibiting the legislature from diminishing pension benefits.

Public Act 98-0599 would diminish public pension benefits in disregard of that constitutional limitation on legislative power. The defendants nevertheless seek to justify the Act on the ground that it will save the State billions of dollars. According to the Act's plain terms, those billions of dollars will come from the pockets of the plaintiffs and other public sector employees and retirees.

That particular method of managing the State's finances is expressly prohibited by our State's Constitution. This appeal thus raises an issue of fundamental importance: the primacy of the Illinois Constitution over considerations of political expediency.

The Pension Protection Clause of the Illinois Constitution prohibits the unilateral diminishment of pension benefits:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

Ill. Constit., Art. XIII, §5.

The Pension Protection Clause was specifically designed to prohibit the diminishment of pension benefits based on precisely the claim of fiscal necessity that the defendants now advance. The drafters of the Constitution knew that the State had historically failed to adequately fund its pension systems, and they were concerned that fiscal exigencies would be used as a justification for reducing pension benefits unless those benefits received constitutional protection. The delegates who supported the Clause recalled that "civil service employees who retired never had their pension altered or amended, even during those trying times during the days of the Depression," and explained that the Clause was intended to protect pensioners "irrespective of the financial condition of a municipality or even the state government." Record of Proceedings, Sixth Illinois Constitutional Convention, Verbatim Transcripts (July 21, 1970) ("Record of Proceedings"), at 2926 (SA 7) (remarks of Delegate Kemp).

This Court has repeatedly recognized that the Pension Protection Clause means what it says. As stated by this Court, the Pension Protection Clause makes it "clear that if something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the State's pension or retirement systems, it cannot be diminished or impaired." *Kanerva v. Weems*, 2014 IL 115811, ¶ 38. The language of the Pension Protection Clause is "plain" and may not be rewritten "to include restrictions and limitations that the drafters did not express and the citizens of Illinois did not approve." *Id.*, ¶ 41. In light of the Clause's plain meaning and intended purpose, "this court has

consistently invalidated amendments to the Pension Code where the result is to diminish benefits." *McNamee v. State*, 173 Ill. 2d 433, 445 (1996).

The defendants concede, as they must, that the Act diminishes pension benefits. (See, *e.g.*, R. C1349, ¶ 43.) Nevertheless, the defendants argue that the Act should be upheld as an exercise of the State's "police powers." This attempt to justify the Act has no valid legal basis because the Pension Protection Clause contains no exception for an exercise of "police powers." Indeed, the Act represents exactly what the drafters of the Clause intended to foreclose by adopting a stand-alone constitutional provision to safeguard public pensions against diminishment. To accept the defendants' "police powers" exception would directly undermine that constitutional purpose.

In a tacit concession that their interpretation of the Pension Protection Clause is meritless, the defendants alternatively suggest that the Clause itself is an unconstitutional relinquishment of the State's sovereignty. (Def. Br. at 40-45.) That novel claim fares no better. Contrary to the defendants' extreme position, the Pension Protection Clause does not compromise the State's sovereignty. Rather, the Clause is a valid limitation on the General Assembly's authority. Like other constitutional limits on legislative power, it cannot be overcome by the defendants' claim of fiscal necessity.

In the final analysis, this case does not present, as the defendants argue, a balancing "between individual contractual rights and the State's sovereign duty to provide for the general welfare." (Def. Br. at 5.) Rather, it presents a straightforward conflict between a constitutional limitation on legislative power and a legislature that deems the limitation inexpedient. It falls to this Court to uphold the promise of the Pension Protection Clause and, with it, the supremacy of the Illinois Constitution over

legislation, however well-intentioned or politically expedient, that exceeds the constitutional bounds of legislative power.

STATEMENT OF FACTS

The defendants' statement of facts is based upon materials that the circuit court did not consider, and to which the plaintiffs were not required to respond, because they were offered to support a defense that the circuit court found to be legally invalid. (R. C2316, ¶ 6 (Nov. 21, 2014 Order of Judge John W. Belz) (A5).) Even though those submissions are not relevant to the purely legal issue presented by this appeal, the defendants nevertheless discuss them in great detail. (Def. Br. at 5-13.) The plaintiffs disagree with the defendants' statement of facts and, if required to do so, would rebut them with their own evidentiary submissions. For the reasons discussed in the circuit court's judgment order and in the argument below, however, that is unnecessary.

The plaintiffs offer the following statement of facts, which is based upon the proceedings before the circuit court, records of the 1970 Constitutional Convention, the legislative history of the Act, relevant legal scholarship, and government records of which this Court may take judicial notice. This statement of facts is intended to explain the context in which the Pension Protection Clause became a part of our State's Constitution, the purpose of the Act that is being challenged in this litigation, and the procedural history of this litigation.

I. THE CONTEXT IN WHICH THE PENSION PROTECTION CLAUSE WAS DRAFTED

By the time the Pension Protection Clause was approved at the 1970 Constitutional Convention and ratified by the people of Illinois, it had been clear for decades that the State of Illinois chronically failed to adequately fund its pension systems.

As early as 1917, the Illinois Public Employees Pension Laws Commission "described the condition of the State and municipal pension systems as 'one of insolvency' and 'moving toward crisis' because the 'financial provisions [were] entirely inadequate for paying the stipulated pensions when due.'" See Madiar, Eric M., "Illinois Public Pension Reform: What's Past is Prologue," *Illinois Public Employee Relations Report*, Vol. 31, No. 3 (Summer 2014) at 3 (citation omitted). Underfunding remained a persistent problem throughout the 20th century. "From 1947 through 1969, the Pension Commission issued a series of biennial reports with dire warnings of the pension systems' impending insolvency, the growth of unfunded pension liabilities, and the significant burden these liabilities posed for 'present and future generations of taxpayers.'" *Id.* at 3-4 (citations omitted). In its 1969 report, the commission explained that the State's "[a]llocations of funds" to its pension systems "have been below mandatory statutory requirements as expressly provided in the governing laws," and warned that "appropriations of grossly insufficient amounts unrelated to accruing requirements, mean only a deferment of the obligation." See 1969 Report of the Illinois Public Employees Pension Laws Commission ("1969 PLC Report") at 106 (SA 17).[1]

The commission's 1969 report disclosed that the five State pension systems—the Judges Retirement System (JRS), the State Universities Retirement System (SURS), the Teachers Retirement System (TRS), the State Employees Retirement System (SERS), and the General Assembly Retirement System (GARS)—had an aggregate funding rate

[1] The Court may take judicial notice of government records. See *May Dep't Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976); see also *Chicago Title Ins. Co. v. Teachers' Ret. Sys.*, 2014 IL App (1st) 131452, ¶ 14 (circuit court could take judicial notice of government records); *People v. Behnke*, 41 Ill. App. 3d 276, 281 (1976) ("An appellate court may take judicial notice of any matter of which a trial court may take judicial notice").

of 41.8%. See 1969 PLC Report at 32 (R. C1003) (SA 16). By way of comparison, as of 2013, the same five pension systems had an aggregate funding rate of 41.1%. See Commission on Government Forecasting & Accountability, *Illinois State Retirement Systems: Financial Condition as of June 30, 2013* (published March 2014), at 27 (SA 36) (R. SB Ex. 20).

II. THE 1970 CONSTITUTIONAL CONVENTION

A. The Debate on the Convention Floor

The delegates to the 1970 Constitutional Convention were mindful that the State had repeatedly "jeopardiz[ed] the resources available to meet the State's obligations to participants in its pension systems in the future" by balancing budgets using amounts that should have been paid into the pension systems. *Kanerva*, 2014 IL 115811, ¶ 45. Accordingly, on July 21, 1970, Delegate Henry Green took to the convention floor and proposed the language that eventually became, with immaterial stylistic changes, the Pension Protection Clause of the Illinois Constitution.

Delegate Green explained the dual purposes of the Pension Protection Clause as follows:

> Now this amendment does two things: It first mandates a contractual relationship between the employer and the employee; and secondly, it mandates the General Assembly not to impair or diminish these rights.

See Record of Proceedings, at 2925 (SA 6). Delegate Green added that this provision would "guarantee these rights and direct the General Assembly to take the necessary steps to fund the pension obligations." *Id.* This was necessary, he explained, because despite "consistent warnings from the Pension Laws Commission," the General Assembly had "failed to meet its commitments to finance the pension obligations on a

sound basis." *Id.* In "lieu of a scheduling provision" for funding the pension systems, Green stated, "I believe we have at least put the General Assembly on notice that these memberships are enforceable contracts and that they shall not be diminished or impaired." *Id.*

Delegate Helen Kinney, a co-sponsor of the proposal, explained that the word "impaired," as used in the provision, "is meant to imply and to intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved." *Id.* at 2926 (SA 7). Delegate Kinney gave a separate definition for the term "diminished," explaining:

> Benefits not being diminished really refers to this situation: If a police officer accepted employment under a provision where he was entitled to retire at two-thirds of his salary after twenty years of service, that could not subsequently be changed to say he was entitled to only one-third of his salary after thirty years of service, or perhaps entitled to nothing. That is the thrust of the word "diminished."

Id. at 2929 (SA 10).

Another supporter of the proposal, Delegate James Kemp, explained its intent as follows:

> I would remind some of the members of this Convention that there have been municipalities in this state that have gone bankrupt, including the city that I come from. I can remember in the city of Chicago when my father was an employee of the city of Chicago that our family subsisted on script; but that I would also call to your attention that even during those times that those civil service employees who retired never had their pension altered or amended, even during those trying times during the days of the Depression.
>
> * * *

> I would presume that the purpose of this proposal is to make certain that irrespective of the financial condition of a municipality or even the state government, that those persons who have worked for often substandard wages over a long period of time could at least expect to live in some kind of dignity during their golden years; and I would urge that we support this obviously nonpartisan measure.

Id. at 2926 (SA 7).

Delegates Green and Kinney made additional statements about the pension benefit guarantee embodied in their proposal. "What we are trying to merely say," Delegate Green explained, "is that if you mandate the public employees in the state of Illinois to put in their 5 percent or 8 percent or whatever it may be monthly, and you say when you employ these people, 'Now, if you do this, when you reach sixty-five, you will receive $287 a month,' that is, in fact, is what you will get." *Id.* at 2931 (SA 12).

Delegate Green's views were echoed by Delegate Kinney: "All we are seeking to do is to *guarantee* that people will have the rights that were in force at the time they entered into the agreement to become an employee, and as Mr. Green has said, if the benefits are $100 a month in 1971, they should be not less than $100 a month in 1990." *Id.* at 2931-32 (SA 12-13) (emphasis added). The "thrust" of the proposal, she further explained, "is that people who do accept employment will not find at a future time that they are not entitled to the benefits they thought they were when they accepted the employment." *Id.* at 2931 (SA 12); see also *id.* at 2929 (SA 10) (the proposal would protect public sector employees from actions that would "abolish[] their rights completely or chang[e] the terms of their rights after they have embarked upon the employment—to lessen them") (remarks of Delegate Kinney).

An opponent of the proposal, Delegate Wayne Whalen, argued that instead of approving the proposal, the Convention should "just add the word 'or pensions' after the word 'contracts' in the contract clause" of the Constitution. *Id.* at 2930 (SA 11). Delegate Whalen's proposal was unsuccessful. The Convention approved the proposal submitted by Delegates Green and Kinney. *Id.* at 2933 (SA 14).

B. Unsuccessful Effort to Modify the Pension Protection Clause

Just over two weeks later, the Chairman of the Public Employees Pension Laws Commission, State Senator E.B. Groen, wrote to Delegate Green to complain that the proposal which eventually became the Pension Protection Clause was "inflexible" and "would only serve to curtail the powers of the Legislature and limit its authority." See Letter from Sen. E.B. Groen to Del. Henry Green, Aug. 7, 1970, at 1 (SA 21). Accordingly, Senator Groen argued that the Convention should revise the Clause by specifying that its protection of pensions was "[s]ubject to the authority of the General Assembly to enact reasonable modifications in employee rates of contribution, minimum service requirements and other provisions pertaining to the fiscal soundness of the retirement systems . . . ." *Id.* at 2 (SA 22). Senator Groen wrote that if this language were added, the proposal would "not completely foreclose the authority of the General Assembly to make desirable changes in some of the basic provisions" of the Pension Code. *Id.* This proposal failed. Delegate Green did not present it to the Convention, and Senator Groen's suggested language was never added to the Pension Protection Clause.

C. Explanation to Voters

The Convention's official guide to the voters explained that, under the Pension Protection Clause, the "provisions of state and local governmental pension and retirement systems shall not have their benefits reduced," and membership "in such systems shall be

a valid contractual relationship." See Sixth Illinois Constitutional Convention, Official Text with Explanation at 4 (SA 19). The guide added that the text of the Pension Protection Clause was "self-explanatory." *Id.* at 16 (SA 20).

III. CONTINUED PENSION UNDERFUNDING AFTER 1970

The General Assembly continued to underfund the State's pension systems. As explained in a March 2013 order issued by the U.S. Securities and Exchange Commission, until 1981, "the State funded pensions by covering the out-of-pocket costs associated with benefits as they came due," an approach that bore "no relation to actuarial calculations of liability." See U.S. SEC Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order, *In the Matter of State of Illinois*, Release No. 9389 (March 11, 2013) ("SEC Order") at ¶ 7 (SA 26). Between 1982 and 1995, "state contributions were held relatively constant" with no "remedial plan in place." *Id.* Thus, by 1995, "the pension systems were significantly underfunded." *Id.*

The State enacted a statutory funding plan which took effect in 1995, but "[r]ather than controlling the State's growing pension burden, the Statutory Funding Plan's contribution schedule increased the unfunded liability, underfunded the State's pension obligations, and deferred pension funding." *Id.* at ¶ 9 (SA 26). This structural underfunding "enabled the State to shift the burden associated with its pension costs to the future and, as a result, created significant financial stress and risks for the State." *Id.* As the SEC found:

> From 1996 to 2010, the State's unfunded liability increased by $57 billion. The State's insufficient contributions under the Statutory Funding Plan were the primary driver of this increase, outweighing other causal factors, such as market performance and changes in benefits.

Id. at ¶ 10 (SA 27). Not only was the statutory funding plan inadequate, but the State did not even "meet the requirements of the plan as enacted in 1995." SEC Order at ¶ 15 (SA 29). The General Assembly enacted pension holidays for itself that lowered "the contribution in 2006 and 2007 by 56 and 45 percent, respectively." *Id.* at ¶ 16 (SA 30).

IV. PUBLIC ACT 98-0599

A. The Act's Pension-Diminishing Provisions

In December 2013, the General Assembly enacted Senate Bill 1 which, upon becoming law, was enrolled as Public Act 98-0599. The Act reduces the pension benefits of members of TRS, SURS, SERS and GARS in at least five significant ways:

- ***AAI reductions:*** It provides that the automatic annual increases (AAIs) in pension annuities "shall be calculated as 3% of the lesser of (1) the total annuity payable at the time of the increase, including previous increases granted, or (2) $1,000 multiplied by the number of years of creditable service upon which the annuity is based." See the Act's amendments at 40 ILCS 5/2-119.1(a-1) (SA 92-93); 40 ILCS 5/15-136(d-1) (SA 257-58); 40 ILCS 5/16-133.1(a-1) (SA 321-22); see also the Act's amendments at 40 ILCS 5/14-114(a-1) (SA 193-94) (same, except for a slightly different multiplier). Before these amendments, those provisions of the Pension Code had provided for AAIs of 3% compounded annually. See 40 ILCS 5/2-119.1(a) and (e) (SA 91-92, 96-97); 40 ILCS 5/14-114(a) (SA 191-92); 40 ILCS 5/15-136(d) (SA 256-57); 40 ILCS 5/16-133.1(a) (SA 319-21).

- ***AAI skips:*** It provides that State retirement system members who have not begun to receive a retirement annuity before July 1, 2014, will receive no AAI at all on alternating years for varying lengths of time, depending on their age. See the Act's

amendments at 40 ILCS 5/2-119.1(a-2) (SA 93-94); 40 ILCS 5/14-114(a-2) (SA 194-95); 40 ILCS 5/15-136(d-2) (SA 258-59); 40 ILCS 5/16-133.1(a-2) (SA 322-23).

- ***New cap on pensionable salary:*** It imposes a new cap on the pensionable salary of members of certain State retirement systems. That cap is the greater of: (a) the salary cap that previously applied only to members who joined the retirement system on or after January 1, 2011; (b) the member's annualized salary as of June 1, 2014; or (c) the member's annualized salary immediately preceding the expiration, renewal, or amendment of an employment contract or collective bargaining agreement in effect on June 1, 2014. See the Act's amendments at 40 ILCS 5/14-103.10(h) (SA 157); 40 ILCS 5/15-111(c) (SA 238-39); 40 ILCS 5/16-121 (SA 301); see also the Act's amendments at 40 ILCS 5/2-108 (SA 82-83) (same, with adjustments to reflect that GARS members are elected to terms in office).

- ***Increase in retirement age:*** It increases the retirement age for members of certain State retirement systems on a sliding scale based upon one's age. The retirement age of a member who was 45 years old on June 1, 2014, would be raised by 4 months. On the other end of the spectrum, a member who was younger than 32 on June 1, 2014, would see his or her retirement age increase by 5 years. See the Act's amendments at 40 ILCS 5/2-119(a-1) (SA 88-91); 40 ILCS 5/14-107(c) (SA 161-63); 40 ILCS 5/15-135(a-3) (SA 247-49); 40 ILCS 5/16-132(b) (SA 311-13).

- ***Changes to interest rates:*** It alters the method of determining interest rates that are used to calculate certain pension benefits for members of TRS and SURS. See the Act's amendments at 40 ILCS 5/15-125(2) (SA 245-46) and 40 ILCS 5/16-112(c) (SA 300).

B. Relevant Legislative History

The General Assembly voted to enact Senate Bill 1 on December 3, 2013. Its chief sponsor in the Illinois Senate, Senator Kwame Raoul, stated in his opening remarks that, according to the Illinois Commission on Government Forecasting & Accountability, the leading cause of pension underfunding "came from the State not contributing what it should have contributed to the retirement systems." See 98th Ill. Gen. Assem., Senate Proceedings, Dec. 3, 2013, at 4 (SA 40); see also *id.* at 5 (SA 41) ("COGFA's analysis revealed that the primary cause of these current unfunded accrued liabilities was one of funding, primarily the failure by past General Assemblies and Governors to properly fund these retirement systems"). Senator Raoul also noted that although Senate Bill 1 requires the General Assembly to contribute additional funding to the pension systems, "the General Assembly retains the ability to change the funding schedule, and therefore change the payment for any given fiscal year, by changing the law." *Id.* at 7 (SA 43).

In response to questions about Senate Bill 1, Senator Raoul agreed that the bill "intends to and will have a direct and substantial impact on the benefits of current employees and retirees by reducing their benefits." *Id.* at 40 (SA 45). He also stated that there "certainly" were other feasible alternatives to Senate Bill 1, but noted that the General Assembly was "trying to move from a stalemate." *Id.* at 43 (SA 48). "[M]any other things could have been possible alternatives," he explained. *Id.* at 44 (SA 49). Senator Raoul further explained that, given the "climate of the General Assembly," he found it "unlikely that the General Assembly would consider, at this time, increased revenues or the necessary cuts" that would achieve the bill's savings. *Id.* at 44-45 (SA 49-50). He would not agree with the suggestion that every other option for dealing with pension underfunding had been exhausted. Rather, he explained, Senate Bill 1 presented

merely the "most feasible pathway to move us forward." *Id.* at 45 (SA 50). Senator Raoul also would not agree that Senate Bill 1 was the least restrictive means available to address pension underfunding; rather, "what we're doing just reflects what the political climate is." *Id.* at 46 (SA 51).

Near the end of the debate, Senator Christine Radogno criticized those who opposed the bill on the "excuse[]" that it was unconstitutional. *Id.* at 49 (SA 54). To those opponents, Senator Radogno replied, "[L]et's get it to the Supreme Court and that will be answered once and for all . . . ." *Id.*

V. PROCEDURAL HISTORY OF THIS LITIGATION

Five lawsuits were filed on behalf of active and retired members of the four affected State retirement systems: TRS, SERS, SURS and GARS. All five of the complaints asserted that the Act violated the Pension Protection Clause. In May 2014, the circuit court entered a preliminary injunction against the Act's enforcement and implementation. (R. C1138–1139.) The defendants did not appeal.

The defendants admitted that implementation of the Act would reduce the pension benefits of the plaintiffs and other members of the four affected State retirement systems. (See, *e.g.*, R. C1349, ¶ 43.) In defense of the Act, the defendants argued that it "represents a valid exercise of the State's reserved sovereign powers to modify contractual rights and obligations." (R. C1358, ¶ 15.) The parties filed cross-motions for summary judgment on the issue of whether the Act violated the Pension Protection Clause. (See R. C1923, C2071.) The plaintiffs also filed a motion for judgment on the pleadings on the constitutional question, and certain plaintiffs moved to strike the affirmative defense. (See R. C2019, C2006.)

On November 21, 2014, the circuit court entered an order granting the plaintiffs' dispositive motions, denying the defendants' summary judgment motion, and finding the Act unconstitutional as violative of the Pension Protection Clause. (R. C2312-17 (A1-6).) Among other things, the circuit court found that it "could not have been more clear that any attempt to diminish or impair pension rights is unconstitutional," and that the Act, on its face, "diminishes the benefits of membership in State retirement systems" through the pension benefit reductions described above. (R. C2312-13, ¶¶ 1, 2 (A1-2).) The circuit court noted that the "defendants can cite to no Illinois case that would allow [their] affirmative defense." (R. C2316, ¶ 6 (A5).) The circuit court also explained that, because it found that the State has no implied or reserved power to diminish pensions, it "need not and does not reach the issue of whether the facts would justify the exercise of such a power if it existed." *Id.* Therefore, the circuit court did not "require the plaintiffs to respond to the defendants' evidentiary submissions" as to whether the Act would have constituted a permissible exercise of such a power. *Id.* The circuit court found the Act inseverable, entered a final judgment that the Act is unconstitutional, and permanently enjoined its enforcement. (R. C2316-17 (A5-6).)

ARGUMENT

The plain language of the Pension Protection Clause, the stated intentions of its drafters, and this Court's precedent all compel the conclusion that the Act exceeds the constitutional limits of legislative power. The Pension Protection Clause unambiguously prohibits the diminishment of public pension benefits. Notwithstanding the defendants' insistence that the Clause incorporates unstated exceptions to that absolute bar, the Clause cannot be read to include the defendants' implied terms. It contains no exception for exercises of the General Assembly's police powers or reserved sovereign powers. In

fact, the Pension Protection Clause was intended specifically to foreclose the type of justifications offered by the defendants in support of the Act.

Equally flawed is the defendants' argument that the Pension Protection Clause itself is an unconstitutional relinquishment of the State's sovereign powers. Because the Pension Protection Clause is a *constitutional* restriction on the legislature's authority, it is not on par with contractual or statutory commitments that conceivably may yield to the General Assembly's sovereign powers. Given the drafters' intent to protect pension benefits in times of fiscal distress, the defendants' novel approach to constitutional interpretation is particularly unfounded.

In short, the circuit court correctly upheld the plain language and purpose of the Pension Protection Clause, faithfully adhered to this Court's precedent, and appropriately enforced a constitutional limitation on legislative power. Further, the circuit court correctly determined that the Act is not severable. Accordingly, the judgment of the circuit court should be affirmed.

I. RELEVANT LEGAL STANDARDS

The standard of review is *de novo*. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 389 (1997). Where, as here, the parties have filed cross-motions for summary judgment, they "agree that only a question of law is involved, and they invite the court to decide the issues based on the record." *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 25.

The language used in a constitutional provision "should be given its plain and commonly understood meaning unless it is clearly evident that a contrary meaning was intended," and someone who argues that the language "should not be given its natural meaning understandably has the burden of showing why it should not." *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 464-65 (1976) (also observing

that this is a "difficult burden"). If a statute is unconstitutional, "courts are obligated to declare it invalid," and this duty "cannot be evaded or neglected, no matter how desirable or beneficial the legislation may appear to be." *Maddux v. Blagojevich*, 233 Ill. 2d 508, 528 (2009).

Finally, "to the extent that there may be any remaining doubt regarding the meaning or effect" of the "pension protection provisions" in the Pension Protection Clause, "we are obliged to resolve that doubt in favor of the members of the State's public retirement systems." *Kanerva*, 2014 IL 115811, ¶ 55.

II. THE ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE PENSION PROTECTION CLAUSE.

A. The Plain Language of the Pension Protection Clause Defeats Any Defense of the Act.

On its face, the Pension Protection Clause is absolute and contains no exceptions:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

See Ill. Constit., Art. XIII, § 5. The Pension Protection Clause does two distinct things. First, it deems membership in State and certain other public pension systems to be a contractual relationship with the employee that is "enforceable" by the courts. *Id.* Second, it restricts legislative power to modify the benefits of that contractual relationship by mandating that such benefits "shall not be diminished or impaired." *Id.* That second provision has independent significance and must be given effect.

The defendants do not contend that the plain language of the Pension Protection Clause includes an express reference to police powers. Instead, they insist that the Contract Clause (Art. I, § 16) and its particular limitations are implicitly "incorporate[d]"

into the Pension Protection Clause. (Def. Br. at 19.) That argument is fundamentally flawed for several reasons.

The defendants' argument turns the plain text of the Pension Protection Clause on its head. In the defendants' view, the absence of an explicit disavowal of an implied exception for the exercise of police powers in the Pension Protection Clause means that there is an implied exception in the Clause. (Def. Br. at 44-45.) In essence, they would require an explicit statement in the Pension Protection Clause that it has no implied exceptions. That, however, is precisely the opposite of this Court's approach to constitutional and statutory interpretation. See *Kanerva*, 2014 IL 115811, ¶ 41 (refusing to read restrictions and limitations into the Pension Protection Clause "that the drafters did not express and the citizens of Illinois did not approve"); *Prazen v. Shoop*, 2013 IL 115035, ¶ 38 (this Court "can neither restrict nor enlarge the meaning of an unambiguous statute"); *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381, 394-95 (1998) (same).

Moreover, when the drafters of the Constitution intended to create exceptions for exercises of police power, they knew how to do so explicitly. See Ill. Constit., Art. I, § 22 ("*Subject only to the police power*, the right of the individual citizen to keep and bear arms shall not be infringed") (emphasis added). The drafters chose not to include such an exception in the clear and unambiguous terms of the Pension Protection Clause.

Contrary to the defendants' argument, the Pension Protection Clause's guarantee that pension benefits "shall not be diminished or impaired" does not mirror the language of the Contract Clause. In addition to prohibiting the impairment of pension benefits, the Pension Protection Clause guarantees that such benefits shall not be "diminished." See Ill. Constit., Art. XIII, § 5. The word "diminished" appears nowhere in the Contract

Clause. See Ill. Constit., Art. I, § 16. When the word "diminished" is used elsewhere in the Constitution, it is given absolute effect. See Ill. Constit., Art. VI, § 14 (judicial salaries "shall not be diminished to take effect during their terms of office"); see also *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 316 (2004) (giving absolute effect to section 14 of Article VI).

Because it defeats their preferred interpretation, the defendants attempt to read the word "diminished" out of the Pension Protection Clause. The defendants argue that the word "diminished" is synonymous with "impaired" and is a mere redundancy. (Def. Br. at 29-30.) Their attempt to reduce "diminished" to a redundancy runs afoul of a fundamental principle of constitutional interpretation: "[E]ach word, clause or sentence must, if possible, be given some reasonable meaning." *Hirschfield v. Barrett*, 40 Ill. 2d 224, 230 (1968); see also *Oak Park Fed. Sav. & Loan Ass'n v. Vill. of Oak Park*, 54 Ill. 2d 200, 203 (1973) (same).

Suggesting that terms such as "cease and desist," "aid and abet," and "free and clear" are examples of redundancy, the defendants argue that "diminished or impaired" should likewise be deemed a redundancy. (Def. Br. at 30.) Aside from the obvious fact that the possible existence of redundancy in other contexts does not mean that a redundancy was intended here, the defendants' argument overlooks the fact that "diminished or impaired" is phrased in the disjunctive, unlike all of the examples of redundancies that the defendants provide. "As used in its ordinary sense, the word 'or' marks an alternative indicating the various members of the sentence which it connects are to be taken separately." *People v. Frieberg*, 147 Ill. 2d 326, 349 (1992). For good

reason, lawyers typically do not send "cease *or* desist" letters, and few people claim to own real estate "free *or* clear."

The defendants' claim that "diminishment" is synonymous with "impairment" also is easily dispelled by reference to the debates at the Constitutional Convention. Delegate Kinney explained that "impaired" and "diminished" were intended to have different meanings. She explained that "impaired" was "meant to imply and to intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved." Record of Proceedings, at 2926 (SA 7). In contrast, the word "diminished," she stated, "refers to this situation: If a police officer . . . was entitled to retire at two-thirds of his salary after twenty years of service, that could not subsequently be changed to say he was entitled to only one-third of his salary after thirty years of service, or perhaps entitled to nothing." *Id.* at 2929 (SA 10). Accordingly, those terms have distinct meanings, and the defendants' attempt to read the word "diminished" out of the Pension Protection Clause must fail.

A similar attempt to read "diminished" out of a nearly identical provision of the Arizona Constitution was recently rejected by the Arizona Supreme Court. See *Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 218-19 (2014). Like the defendants here, the defendants in *Fields* argued that pension diminishments were subject to a balancing test under the Contract Clause. The Arizona Supreme Court rejected that interpretation because it "would render superfluous the latter portion" of the Arizona Constitution's pension protection clause, which "prohibits diminishing or impairing public retirement benefits." *Id.* The correct interpretation, the *Fields* court ruled, was that the pension

protection clause "confers additional, independent protection for public retirement benefits separate and distinct from the protection afforded by the Contract Clause." *Id.*

The defendants attempt to distinguish *Fields* on the supposed basis that Arizona's pension protection clause is "textually distinct" from Illinois's Pension Protection Clause, apparently because Arizona's pension protection clause contains an express reference to the Contract Clause. (Def. Br. at 35.) See Ariz. Constit., Art. XXIX, § 1(C) ("Membership in a public retirement system is a contractual relationship that is subject to article II, section 25, and public retirement system benefits shall not be diminished or impaired"); see also Ariz. Constit., Art. II, § 25 (contract clause). If anything, this distinction cuts against the defendants' position. *Fields* makes clear that the prohibition against the diminishment or impairment of pension benefits has independent and dispositive significance even in the face of an explicit reference to the Contract Clause.

In yet another effort to avoid the plain terms of the Pension Protection Clause, the defendants cite a federal bankruptcy court decision interpreting the Michigan Constitution, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich. 2013). Their reliance on that case is unavailing for several reasons. First, this Court has long recognized that the Michigan Constitution, unlike the Illinois Constitution, contains "restrictive language that has permitted modifications in benefits," and that to take a similar approach in this State, "we would have to ignore the plain language of the Constitution of Illinois." *Felt v. Bd. of Trustees of Judges Ret. Sys.*, 107 Ill. 2d 158, 167-68 (1985). The Michigan Constitution protects only "accrued" public pension benefits (see Mich. Constit., Art. IX, § 24), while the Illinois Pension Protection Clause is written in absolute terms (see Ill. Constit., Art. XIII, § 5). Moreover, to the extent it deemed "diminished" to be a

redundant or meaningless term in the Michigan Constitution, the bankruptcy court erred. As discussed above, no constitutional language should be deemed superfluous. Finally, the debates from the Illinois Constitutional Convention establish that "diminish" and "impair" were intended by the drafters to be distinct terms with separate meanings, whereas the bankruptcy court's review of debates from the 1963 Michigan Constitutional Convention revealed no such intent. See *City of Detroit*, 504 B.R. at 151-52 (quoting debates from Michigan Constitutional Convention).

In any case, the defendants' argument that "diminished" is a redundancy cannot be squared with this Court's precedent, which makes clear that the terms "diminished" and "impaired," in the context of the Pension Protection Clause, each have independent significance. This Court has recognized that the word "impaired" was intended to authorize a cause of action by pension system members in the event that their pension system is on the verge of default or imminent bankruptcy. See *McNamee*, 173 Ill. 2d at 446-47 (quoting Delegate Kinney's remarks). Thus, a pension system member "need not wait until benefits are actually diminished to bring suit under the clause." *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 232 (1998) (discussing *McNamee*). If a beneficiary need not wait until benefits are "diminished" to bring an action for "impairment," the terms necessarily have distinct meanings.

B. The Stated Intentions of the Drafters of the Pension Protection Clause Defeat Any Defense of the Act.

1. The drafters intended to protect pension system members from the consequences of pension system underfunding.

It is no accident that the Illinois Constitution includes a separate clause safeguarding public pension benefits. The drafters intended to shield public employees

from having their pensions "altered or amended" due to fiscal exigencies, even in circumstances comparable to the Great Depression. Record of Proceedings, at 2926 (SA 7) (remarks of Delegate Kemp). These protections were intended to apply "irrespective of the financial condition of a municipality or even the state government." *Id.* The interpretation of the Pension Protection Clause offered by the defendants is contrary to the expressed intentions of the Constitution's drafters.

The defendants argue that the purpose of the Pension Protection Clause was merely to elevate all pensions to the status of contractual relationships. (Def. Br. at 31-33.) To the contrary, the drafters' paramount goal was to provide absolute protection for public pensions, not to create a contractual relationship that could be diminished or impaired. Defining membership in all public pension systems as contractually enforceable was a means of achieving that goal. The first provision in the Pension Protection Clause indeed eliminated the gratuitous nature of mandatory pension plans—the first step in protecting pension benefits absolutely. But the ultimate goal was achieved by the additional provision prohibiting the legislature from diminishing or impairing pension benefits.

The Pension Protection Clause was intended to accomplish at least "two things:"

> It first mandates a contractual relationship between the employer and the employee; and *secondly, it mandates the General Assembly not to impair or diminish these rights.*

Record of Proceedings, at 2925 (SA 6) (remarks of Delegate Green) (emphasis added). The defendants tellingly ignore this second purpose of the Pension Protection Clause. Indeed, the drafters' overarching goal was to prohibit the diminishment or impairment of

pension benefits that would otherwise be the likely result of pension system underfunding. As Delegate Green explained:

> What we are trying to do is to mandate the General Assembly to do what they have not done by statute. . . . If we are going to tell a policeman or a school teacher that, "Yes, if you will work for us for your thirty years or until whenever you reach retirement age, that you will receive this," if the state of Illinois and its municipalities are going to play insurance company and live up to these contributions, then they ought to live by their own rules. And this is all in the world this mandate is doing.

Record of Proceedings, at 2931 (SA 12).

Delegate Green added that his proposal was prompted by a New Jersey Supreme Court decision. *Id.* That decision, *Spina v. Consol. Police & Firemen's Pension Fund Comm'n.*, 197 A.2d 169 (N.J. 1964), rejected a Contract Clause and due process challenge to pension benefit diminishments. The pension benefit diminishments in that case were justified on the ground that the New Jersey pension systems were so underfunded as to carry with them "the promise of inevitable doom." *Id.* at 170, 172-76; see also Record of Proceedings, at 2931 (SA 12). "Now this," Delegate Green explained, was what the public employees of Illinois were "very fearful of." Record of Proceedings, at 2931 (SA 12). The drafters of the Pension Protection Clause thus sought to foreclose in Illinois what had happened in New Jersey. They did so by absolutely insulating public pension benefits from reductions that might be justified on the basis of pension system underfunding. The defendants' theory that the Pension Protection Clause is just a "contract clause" for pensions simply fails to account for the concerns that motivated the drafting of the Clause in the first place.

The defendants' argument that the General Assembly has an implicitly reserved power to diminish pension benefits on the basis of funding shortfalls could not be more at odds with the drafters' objectives. The drafters intended that the absolute protection of pension benefits would indirectly compel the funding of the pension systems. Delegate Green argued that a similar pension protection clause in New York's Constitution had caused that state's pension funds to be "fully funded," and he suggested that a pension protection clause in the Illinois Constitution would "be a mandate to the General Assembly to do something which they have not previously done in some twenty-two years," *i.e.*, to adequately fund the public pension systems. See Record of Proceedings, at 2925 (SA 6). Delegate Green added that "in lieu of a scheduling provision" for funding the systems, the Pension Protection Clause would "at least put the General Assembly on notice that these memberships are enforceable contracts and that they shall not be diminished or impaired." *Id.* Citing these remarks, this Court has recognized that the Pension Protection Clause "was intended to force the funding of the pensions indirectly, by putting the state and municipal governments on notice that they are responsible for those benefits." *McNamee*, 173 Ill. 2d at 442. Accordingly, even where the State has chosen to forego actuarially sound funding of its pension systems, the Pension Protection Clause mandates that government employers pay pension benefits as promised.

This purpose would be totally frustrated if the State could avoid the consequences of its underfunding of the State pension systems simply by diminishing pension benefits. In that event, the Pension Protection Clause would not even *indirectly* force the funding of the State pension systems. The State would have no incentive to adequately fund the State pension systems, since underfunding itself could be used to justify the

diminishment of pension benefits. The defendants' interpretation thus would permit a downward spiral of chronic underfunding and periodic pension diminishment, which would end only when the benefits were reduced to almost nothing. That is emphatically not what the drafters of the Pension Protection Clause intended.

Because the Pension Protection Clause "was based on a nearly identical provision of the New York constitution" (*Kanerva*, 2014 IL 115811, ¶ 38), another strong indicator of the drafters' intent can be found in an opinion of New York's highest court which interpreted that state's pension protection clause a dozen years before the 1970 Illinois Constitutional Convention. See *Birnbaum v. N.Y. State Teachers Ret. Sys.*, 5 N.Y.2d 1, 11-12 (N.Y. 1958). In *Birnbaum*, a New York state retirement system argued that it would be "plunged into bankruptcy" unless it were allowed to diminish its members' pension benefits. *Id.* The New York Court of Appeals replied: "If bankruptcy now threatens to overtake the Teachers Retirement System, the system must turn to the Legislature for financial assistance. It may not ask us to ignore the will of the people as expressed in their Constitution." *Id.* at 12. If the delegates to the Illinois Constitutional Convention in 1970 wanted to accomplish a different result, and to allow the General Assembly some power to diminish pensions, they could have done so. They chose not to do so. There is no legal basis to ignore that choice now.

2. The defendants misconstrue the drafters' intent.

In an effort to obscure the drafters' intentions, the defendants construct an incomplete account of the Constitutional Convention by cobbling together comments by opponents of the Pension Protection Clause and comments by delegates about other subjects. The defendants rely on comments by Delegate Wayne Whalen. (Def. Br. at 32-33.) Delegate Whalen, however, was an opponent of the Pension Protection Clause.

Record of Proceedings, at 2933 (SA 14) (roll call vote). Allowing a proposed constitutional provision's opponents to define its meaning would be "mischievous" because of the "opportunity it would afford a minority to frustrate the purpose of" the majority. *Hanley v. Kusper*, 61 Ill. 2d 452, 460 (1975). Moreover, Delegate Whalen argued that, instead of approving the proposal that eventually became the Pension Protection Clause, the Convention should instead have added a reference to pensions to the Contract Clause. See Record of Proceedings, at 2930 (SA 11). That proposal was not accepted, and the delegates instead approved a distinct and independent clause specifically protecting pensions from diminishment or impairment. If anything, then, Delegate Whalen's comments reflect views that the Convention as a whole considered and chose not to adopt with respect to the constitutional protection of pensions.

The defendants also rely on comments by Delegate Leonard Foster, even though: (i) he also voted against the proposal that eventually became the Pension Protection Clause (see *id.* at 2933 (SA 14)); (ii) his quoted comments were about a different constitutional provision—the guarantee of the right to bear arms (see *id.* at 1689 (SA 5)); and (iii) he made his quoted remarks on June 10, 1970 (see *id.*), over a month before the convention considered the proposal that eventually became the Pension Protection Clause. The defendants also rely on comments by Delegate Rev. Francis Lawlor. (Def. Br. at 33-34.) Those comments also referred to an entirely different constitutional provision and were made long before the convention took up the proposal that eventually became the Pension Protection Clause. See Record of Proceedings, at 1480-81 (SA 3-4).

The remarks of Delegates Foster and Lawlor actually undermine the defendants' argument. Delegate Foster's remarks about the police powers related to the right to bear

arms, which the Constitution expressly made "[s]ubject" to "the police power." See Ill. Constit., Art. I, § 22. Delegate Lawlor's remarks were about the right to assemble, which is expressly limited to "a peaceable manner" of assembly. See Ill. Constit., Art. I, § 5. These examples demonstrate that the drafters of the Constitution knew how to state exceptions to constitutional rights directly in the text of the Constitution. They chose not to do so in the Pension Protection Clause. In fact, as described above, there was a proposal during the Constitutional Convention to add such an exception to the Pension Protection Clause. See Letter from Sen. E.B. Groen to Del. Henry Green, Aug. 7, 1970 (SA 21-23). That proposal was unsuccessful, thus demonstrating that it was contrary to the drafters' intention of guaranteeing that public pension benefits would not be diminished or impaired.

C. A Long Line of Legal Precedent Defeats Any Defense of the Act.

1. The asserted defense of the Act has been expressly rejected in cases interpreting the Pension Protection Clause.

A long line of Illinois authority defeats the defendants' argument that the Pension Protection Clause contains an implied exception for the exercise of the State's police powers. The principal question presented in this appeal was first resolved by the appellate court in *Kraus v. Bd. of Trustees of Police Pension Fund of Vill. of Niles*, 72 Ill. App. 3d 833, 850-51 (1979). In that case, the appellate court recognized that a "Pension Code modification changing the basis upon which pension benefits are directly determined cannot be applied to diminish the benefits of those who became members of the system prior to the statute's effective date." *Id.* at 850. The appellate court noted that the defendant and the Attorney General "nevertheless assert that the legislature should

retain a reasonable power of modification, even to diminish the benefits to be received by prior members of the pension system." *Id.* at 851. The appellate court rejected that argument and observed that "the Pension Laws Commission attempted to have language allowing a reasonable power of legislative modification added to the section or read into the debates to establish intent, but no such action was taken during the convention." *Id.* (citation omitted). "While it might have been wise to provide for such a power," the court concluded, "there is no suggestion in the wording of the provision or in the debates to support the existence of one." *Id.* (internal citation omitted).

This Court rejected precisely the same argument in *Felt v. Bd. of Trustees of Judges Ret. Sys.*, 107 Ill. 2d 158 (1985), when it held unconstitutional an amendment to the Pension Code that modified the formula for calculating the pensionable salaries of Judges Retirement System members so as to reduce their pension annuities. Before it analyzed the plaintiffs' separate claim that the amendment violated the Contract Clause of the federal and state constitutions, this Court squarely held that the statutory "change in the basis of computation" of judges' pensionable salaries "clearly effects a reduction or impairment in the retirement benefits of the plaintiff members of State retirement systems in violation of the constitutional assurance of section 5 of article XIII." *Id.* at 162-63. Near the end of its opinion, this Court rejected the defendants' argument that Illinois should fall in line with other "jurisdictions which permit a reduction in retirement benefits." *Id.* at 167-68. This Court explained:

> [The defendants] note that in at least three States, Alaska, Hawaii and Michigan, there are constitutional provisions relating to pensions. As was observed in *Kraus v. Board of Trustees* (1979), however, in those constitutional provisions, unlike ours and that of New York, there is restrictive language that has permitted modifications in

> benefits. In order to accept the defendants' argument we would have to ignore the plain language of the Constitution of Illinois . . . .

Id. at 167-68 (internal citation omitted).

Amazingly, the defendants argue that *Felt* held the opposite of what it actually said. They argue that while *Felt* held a pension diminishment unconstitutional and denied that the General Assembly had any power to reduce pension benefits for current State retirement system members, it implicitly acknowledged a legislative power to diminish pensions. (Def. Br. at 35-37.) To support this argument, the defendants take a snippet of *Felt* dramatically out of context. *After* holding that the pension diminishment was an unconstitutional violation of the Pension Protection Clause, the Court addressed the plaintiffs' separate argument that the pension diminishment additionally violated the Contract Clause of the federal and state constitutions. See 107 Ill. 2d at 165-66. With respect to that Contract Clause claim, the defendants argued that the pension diminishments were "within the State's police power." *Id.* at 165. The Court made the offhand observation that "[p]resumably the defendants would offer a similar contention regarding" the Pension Protection Clause, and then promptly rejected the defendants' argument as "not convincing." *Id.* at 166. The Court proceeded to explain why the defendants' argument failed even on its own terms (see *id.* at 166-67), but the Court never said that there was a police-powers exception to the Pension Protection Clause. In fact, the Court held that it "would have to ignore the plain language of the Constitution of Illinois" to recognize a legislative power to reduce pension benefits. *Id.* at 167-68. In short, the defendants' interpretation of *Felt* cannot withstand any careful reading of that opinion.

In the three decades since *Felt*, this Court and the appellate court have consistently held pension reductions unconstitutional where they affect currently employed or retired members of State retirement systems. In 1987, this Court held unconstitutional a statutory amendment that merely created a new deadline by which a pre-existing pension benefit had to be claimed, explaining that "the legislature cannot divest the plaintiff of these rights." *Buddell v. Bd. of Trustees, State Univ. Ret. Sys. of Ill.*, 118 Ill. 2d 99, 106 (1987). In doing so, this Court made no mention of any police power to diminish pension benefits, nor did it subject the diminishment to any sort of balancing test. Summarizing the state of the law almost a decade later, this Court observed that it "has consistently invalidated amendments to the Pension Code where the result is to diminish benefits." *McNamee*, 173 Ill. 2d at 445 (citing *Felt* and *Buddell*). Indeed, since the 1970 Constitution came into effect, no Illinois court has held any amendment to the Pension Code constitutional under the theory asserted by the defendants.

Likewise, in this Court's most recent interpretation of the Pension Protection Clause, it recognized that "[w]e may not rewrite the pension protection clause to include restrictions and limitations that the drafters did not express and the citizens of Illinois did not approve." *Kanerva*, 2014 IL 115811, ¶ 41. That holding necessarily defeats the sole defense in this case. As this Court correctly recognized in *Kanerva*, pension benefits are "insulated from diminishment or impairment by the General Assembly." See *id.*, ¶ 48; see also *id.*, ¶ 57 (General Assembly was "precluded" from diminishing or impairing benefits to which the Pension Protection Clause applied).

While the defendants argue that *Kanerva* relates "only" to "what kinds of benefits fall within the Pension Clause" (Def. Br. at 38), there is no principled reason to restrict the Court's overall approach to interpreting the Pension Protection Clause—specifically, its refusal to read unstated restrictions into that clause's language—to cases in which the parties dispute whether the Clause applies to a certain benefit. The Court's refusal to rewrite the Clause is equally valid whenever parties, such as the defendants in this case, seek to add new restrictions or limitations that are not expressly stated in the Clause's text. The defendants certainly offer no principled reason why the Court should decline invitations to rewrite the Pension Protection Clause in some cases but not others.

The defendants also misunderstand the import of this Court's decisions in *People ex rel. Ill. Fed. of Teachers v. Lindberg*, 60 Ill. 2d 266 (1975) and *McNamee*, 173 Ill. 2d 433, when they argue that those cases "upheld as constitutional" the State's practice of chronically underfunding the State pension systems. (Def. Br. at 6.) Far from placing this Court's *imprimatur* on the State's failure to adequately fund the pension systems, those cases instead merely held that, while the Pension Protection Clause guarantees pension benefits, it does not specify any particular funding schedule. See *Lindberg*, 60 Ill. 2d at 271-72; *McNamee*, 173 Ill. 2d at 445-47; *Sklodowski*, 182 Ill. 2d at 232-33. Accordingly, members of the State pension systems would have standing to enforce the State's obligation to fund those systems, through an action for impairment, once those systems were on the verge of default or imminent bankruptcy (see *Sklodowski*, 182 Ill. 2d at 233)—a scenario that was not present in *Lindberg*, *McNamee* or *Sklodowski*.

It does not follow that the State is constitutionally authorized to use its own underfunding of the pension systems as a justification for diminishing pension benefits.

To the contrary, the absolute protection of pension benefits was "intended to force the funding of the pensions indirectly." *McNamee*, 173 Ill. 2d at 442. While the State is not held to a specific funding schedule, it is ultimately responsible for funding the State pension systems so that pensioners' benefits are not diminished or impaired. If the State could have it both ways—that is, if the State were allowed to fund the pension systems at almost any level of its choosing *and* enjoyed a power to diminish pension benefits—then the Pension Protection Clause would be meaningless.

In short, Illinois courts have "consistently rendered special protection for employees receiving (or scheduled to receive) payments pursuant to their pensions." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 349 Ill. App. 3d 779, 785 (2004), *aff'd*, 215 Ill. 2d 381 (2005). Thus, "our courts have time and again made clear that *any* reduction, diminution or impairment of pension benefits violates an enforceable contractual relationship between an employee and his employer, impinges upon the employee's constitutional protections, *and will not be tolerated.*" *Id.* (emphasis added).

2. This Court has rejected similar attempts to justify constitutional violations on the basis of financial necessity.

The defendants' attempt to justify the Act also is foreclosed by the fundamental principle that the "General Assembly cannot enact legislation that conflicts with specific provisions of the constitution, unless the constitution specifically grants the legislature that authority." *O'Brien v. White*, 219 Ill. 2d 86, 100 (2006). In other words, the General Assembly can have no implied power to do what the Constitution expressly prohibits. Rather, "limitations written into the Constitution are restrictions on legislative power." *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 215 (1979). Put another way, "the constitution is not regarded as a grant of powers to the legislature but is a limitation upon

its authority; the legislature may enact any legislation not expressly prohibited by the constitution." *People ex rel. Chicago Bar Ass'n v. State Bd. of Elections*, 136 Ill. 2d 513, 525 (1990). Accordingly, an exercise of the police power "must not conflict with the Constitution." *City of Belleville v. St. Clair Cnty. Tpk. Co.*, 234 Ill. 428, 437 (1908).

This Court's precedents make clear that no crisis can give the political branches of government the power to violate the Constitution. This principle has been applied specifically to enforce constitutional prohibitions against diminishing compensation owed to public servants, notwithstanding arguments based upon fiscal exigencies. See *Jorgensen*, 211 Ill. 2d at 316 ("No principle of law permits us to suspend constitutional requirements for economic reasons, no matter how compelling those reasons may seem"); *People ex rel. Lyle v. City of Chicago*, 360 Ill. 25, 29 (1935) ("Neither the Legislature nor any executive or judicial officer may disregard the provisions of the Constitution even in case of a great emergency"). As the appellate court explained in *People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284, 289 (1941), "an emergency cannot be created by the facts and used as a means of construction of a constitutional provision which has made no reference to any emergency by its terms." As demonstrated by *Lyle* and *Northrup*, this principle was consistently applied by Illinois courts even during the Great Depression.

The defendants attempt to distinguish *Jorgensen* and *Lyle* on the basis that they arose under separate constitutional provisions and implicated the separation of powers. (Def. Br. at 39-40.) The municipal judges in *Lyle* based their claims upon a provision of the 1870 Constitution that protected the salaries of municipal officers, not the Judicial Article. See 360 Ill. at 27-29 (the relators, municipal judges, were "municipal officers").

Thus, *Lyle* did not rest upon separation of powers principles. This fact also defeats the defendants' argument that *Lyle* drew a distinction between contract rights and judicial salaries. (Def. Br. at 39-40.)

Jorgensen did raise important concerns about the separation of powers, but the defendants' attempt to distinguish that case cuts too thin. *Jorgensen* was based on the "clear and unconditional" terms of Article VI, § 14 of the Constitution (see 211 Ill. 2d at 305), which, like the Pension Protection Clause, guarantees that certain compensation shall not be "diminished." *Jorgensen* therefore is instructive here. *Lyle* and *Northrup* likewise were based upon "plain and unequivocal" constitutional provisions that "contained nothing that expressly or impliedly authorized deviation from their terms . . . ." *Jorgensen*, 211 Ill. 2d at 304 (discussing *Lyle*); *Northrup*, 308 Ill. App. at 289 (basing its holding on the fact that "[t]here are no words" in the applicable constitutional guarantee of compensation "which make any reference, either directly or by implication, to the subject of an emergency"). Those cases support the plaintiffs' reliance here upon the equally plain and unequivocal language of the Pension Protection Clause.

The defendants also invoke the adage that the Constitution is not a suicide pact. (Def. Br. at 43.) Setting aside whether such hyperbolic rhetoric is even appropriate under the circumstances presented here, this Court has consistently enforced the Illinois Constitution despite arguments premised on dire fiscal conditions. Even in the midst of the Civil War, this Court rejected the argument that adherence to a State constitutional provision would leave the State with "no adequate provision remaining to meet the ordinary expenses of the State government." *People ex rel. Merchants' Sav., Loan & Trust Co. of Chicago v. Auditor of Pub. Accounts*, 30 Ill. 434, 445 (1863). This Court

replied that the General Assembly was "clothed with ample powers to provide for all financial difficulties." *Id.* No financial difficulties, the Court explained, could justify violating the Constitution. *Id.* at 444. Rather, our "safety, in the midst of perils, is in a strict observance of the constitution—this is the bulwark to shield us from aggressions." *Id.*

D. The Defendants' Interpretation, Not the Circuit Court's, Would Create an "Unworkable" Rule of Law.

The defendants criticize the circuit court for creating a new and "unworkable" rule of law. (Def. Br. at 16.) That criticism is unfounded. The circuit court created no new rule of law. It merely applied the Pension Protection Clause according to its plain terms and according to the interpretation that Illinois courts have consistently given those plain terms over multiple decades.

When the defendants say that this rule of law is "unworkable," what they presumably mean is that the State has fiscal problems, and that the political branches of the State government would prefer to address those problems by diminishing pension benefits. In a remarkable flight of fancy, the defendants describe a hypothetical "epidemic" in which the State's pension obligations make it impossible to purchase and distribute a vaccine. (Def. Br. at 20.) They also describe a hypothetical scenario in which the State's pension obligations force it to "close its prisons and schools." *Id.* The defendants openly admit that "those precise circumstances may not be presented here." *Id.* But they argue that those non-existent facts should drive this Court's interpretation of the Pension Protection Clause. *Id.*

If adopted, the defendants' proposed crisis-based legal standard would seriously distort constitutional law. Just as one can imagine a nightmare scenario in which the

State's pension obligations render it incapable of saving the people from an epidemic, one can imagine all sorts of equally far-fetched hypotheticals in which virtually any constitutional restraint on legislative or executive power could have catastrophic consequences. For example, the Constitution provides that the State may tax incomes only "at a non-graduated rate." See Ill. Constit., Art. IX, § 3(a). But what if the State needed to impose an income tax at a graduated rate in order to raise money to save the people from an epidemic? Does positing that hypothetical mean that the State now may tax incomes at a graduated rate as long as the tax is deemed reasonable and necessary to serve an important State interest? Likewise, the Constitution limits a governor's term to four years. See Ill. Constit., Art. V, §§ 1, 2. But what if a governor needed to extend his term to five years in order to save the people from epidemics or terrorist attacks? Even if one could plausibly imagine such a scenario, that does not mean that every governor's term is now subject to an open-ended balancing test. Our constitutional law is grounded in the text of the Constitution (see, *e.g.*, *People v. Purcell*, 201 Ill. 2d 542, 549 (2002)), not in doomsday scenarios.

III. THE PENSION PROTECTION CLAUSE DOES NOT COMPROMISE THE STATE'S SOVEREIGNTY.

A. The Federal Constitution Does Not Prohibit a State From Limiting Its Own Powers Through Its Constitution.

The issue before this Court is the extent to which the Pension Protection Clause of the Illinois Constitution limits the power of the General Assembly. There is no federal question. Nevertheless, the defendants argue that the "reserved powers doctrine" of the Contract Clause in the federal Constitution *prohibits* a state from limiting its own powers under its own law. (Def. Br. at 40-45.) The defendants' theory is unprecedented and contrary to basic principles of federalism.

The reserved powers doctrine merely holds that the federal Contract Clause will not lock a state into a contract that surrenders one of several specific sovereign powers. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977). The doctrine does not require states to maintain the maximum sovereign powers permitted by the federal Constitution. None of the cases cited by the defendants supports that proposition. In fact, the United States Supreme Court has explicitly invited states to limit their sovereign powers if they so choose. *Compare Kelo v. City of New London, Conn.*, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes") (footnote omitted) *with U.S. Trust Co. of New York*, 431 U.S. at 23-24 (recognizing the power of eminent domain as an essential sovereign power). The Illinois Appellate Court has likewise recognized that "the State is free as a matter of its own law to impose greater restrictions on the police power than those held to be necessary upon federal constitutional standards." *Parkway Bank & Trust Co. v. City of Darien*, 43 Ill. App. 3d 400, 406 (1976).

The defendants' reserved powers argument confuses contracts and statutes with constitutions. The reserved powers doctrine addresses the surrender of sovereign powers by contract or statute. See, *e.g.*, *U.S. Trust Co. of New York*, 431 U.S. at 23-24. This Court, however, is being asked to interpret a constitutional provision. There is no reserved power exception to the specific limits which a state's constitution places on that state's legislature. *See, e.g., O'Brien*, 219 Ill. 2d at 100 ("the General Assembly cannot

enact legislation that conflicts with specific provisions of the constitution"); *Flushing Natl. Bank v. Municipal Assistance Corp. for City of N.Y.*, 40 N.Y.2d 731, 740 (N.Y. 1976) ("the police power which may override statutes is not a higher law which transcends Constitutions as well").

The irrelevance of the reserved power doctrine to the interpretation of the Pension Protection Clause is well illustrated by *Flushing National Bank*, a case arising from the State of New York's efforts in the 1970s to reduce New York City's crushing municipal debt. At issue in *Flushing National Bank* was a law preventing certain short-term municipal noteholders from enforcing their notes in court for a period of three years. *Id.* at 733. The New York State Constitution contained a clause requiring the City to pledge its "faith and credit" to all debt obligations. The court interpreted the faith and credit clause as an unambiguous commitment, without exception, to pay the notes as they came due—a "super contract," as the defendants would describe it. *Id.* at 734-36. The New York Court of Appeals held that regardless of the city's fiscal distress and the legislature's claimed "police powers," the faith and credit clause flatly prohibited the moratorium law. *Id.* The court further held that the legislature's violation of this constitutional provision could "not be justified by fugitive recourse to the police power of the State or to any other constitutional power to displace inconvenient but intentionally protective constitutional limitations." *Id.* at 736. Of particular relevance to the defendants' reserved powers argument, the court explicitly declined to apply federal Contract Clause jurisprudence because "[f]ederal constitutional provisions, especially the impairment clause, cast little light on the State constitutional issues in this case." *Id.* at

740. In other words, the state's constitution, not a contract, limited the legislature's power, so the question of reserved powers was beside the point.

Here, just as in *Flushing National Bank*, a constitution, not a contract or a statute, prohibits the legislature from avoiding a financial obligation. Just as in *Flushing National Bank*, the defendants invoke police powers and a purported fiscal emergency as justification for doing precisely what the State Constitution prohibits. Just as in *Flushing National Bank*, the federal Contract Clause and the reserved power doctrine are beside the point. Regardless of whether a legislature can surrender its sovereign powers by contract or statute, no reserved sovereign power allows a state legislature to sidestep the plain prohibitions set out in its own constitution.

B. The Pension Protection Clause Imposes Only a Financial Obligation and Does Not Surrender the State's Police Powers.

Even beyond the irrelevance of the reserved powers doctrine, the defendants are simply wrong in characterizing the State's attempt to reduce its financial obligations by diminishing pension benefits as an exercise of "police powers." Likewise, the Pension Protection Clause's prohibition on diminishing pension benefits does not constitute a withholding of "police powers."

In applying the reserved powers doctrine, the U.S. Supreme Court has distinguished essential sovereign powers, like the police power, from restrictions imposed by financial obligations. *U.S. Trust Co. of New York*, 431 U.S. at 23-24. For instance, courts have acknowledged that police powers and the power of eminent domain are essential sovereign powers subject to the reserved powers doctrine, but that a state's power to tax and spend can be bound through contract and therefore is not subject to the reserved powers doctrine. *See, e.g., Matsuda v. City & Cnty. of Honolulu*, 512 F.3d

1148, 1153 (9th Cir. 2008) ("a state will be bound by contracts that limit the use of its taxing and spending powers, even though such contracts limit the state's future exercise of discretion in material ways"); see also *United States v. Winstar Corp.*, 518 U.S. 839, 880 (1996) (plurality) ("no sovereign power is limited by the Government's promise to purchase"); *U.S. Trust Co. of New York*, 431 U.S. at 25 n.23 ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity") (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877)).

A survey of the cases the defendants cite in support of their argument illustrates the difference between police powers and the mere avoidance of financial obligations. *Compare U.S. Trust Co. of New York*, 431 U.S. at 21-25, 29 (law intended to alter state's bond obligations to further important public purposes not an exercise of police power) *with Stone v. Mississippi*, 101 U.S. 814, 817-18 (1879) (law outlawing lottery is exercise of police power); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) (law outlawing alcohol is exercise of police power); *Nw. Fertilizing Co. v. Vill. of Hyde Park*, 70 Ill. 634, 636-37, 642-45 (1873) (law regulating hauling of dead animals is exercise of police power); *Atlantic Coast Line R.R. Co. v. City of Goldsboro, N.C.*, 232 U.S. 548, 552-53, 558-62 (1914) (safety regulations pertaining to railroad are exercise of police power); *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498, 499-500 (1919) (law regulating storage of combustible fluids is exercise of police power); *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 750-51 (1884) (law prohibiting livestock monopolies is exercise of police power).

Illinois courts also have recognized that financial obligations are distinct from police powers. *Indep. Voters of Illinois Indep. Precinct Org. v. Ahmad*, 2014 IL App (1st) 123629, ¶¶ 67-83 (contract privatizing parking meters does not surrender police powers where city retains wide latitude to regulate street parking even though city must pay financial penalty if regulations reduce parking revenues), *leave to appeal denied*, 20 N.E.3d 1255 (table) (2014); *Sklodowski*, 162 Ill. 2d at 150 (Freeman, J., concurring in part and dissenting in part) ("States are regularly held to their debt contracts, the [United States Supreme] Court recognizing that mere financial obligations do not compromise reserved powers") (citation omitted).

This critical distinction cannot be overcome by claims, like those made by the defendants, that a particular financial obligation is straining resources needed for other purposes:

> Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.

U.S. Trust Co. of New York, 431 U.S. at 24. Accordingly, the reserved powers doctrine is not implicated by the State's obligation to pay pension benefits.

The Pension Protection Clause imposes only a financial obligation. It does not prevent the State from criminalizing some act or regulating some industry. See *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 692 (N.C. 1997) ("promise to pay pensions does not bargain away a power of the state or local government necessary to protect the vital interests of the people"). The defendants' reserved powers argument therefore fails for the additional reason that financial

obligations alone do not surrender the police power or any other essential sovereign power.

Moreover, as noted above, the drafters intended that the Pension Protection Clause would serve as a bulwark for public pensions *especially* in times of fiscal distress. Particularly given that constitutional purpose, the Act simply cannot be justified as an exercise of "police powers" or any other implicitly reserved sovereign power. See *Flushing National Bank*, 40 N.Y.2d at 736 (holding that violation of New York's full faith and credit clause "may not be justified by fugitive recourse to the police power of the State or to any other constitutional power to displace inconvenient but intentionally protective constitutional limitations" where the clause was "designed . . . to protect rights vulnerable in the event of difficult economic circumstances"). Indeed, "it is destructive of the constitutional purpose for the Legislature to enact a measure aimed at denying that very protection on the ground that government confronts the difficulties which, in the first instance, were envisioned." *Id.*

C. The Unmistakability Doctrine Does Not Apply.

The defendants' reliance on the "unmistakability doctrine" (Def. Br. at 44-45) fails for many of the same reasons as their reserved powers argument. A corollary to the reserved powers doctrine, the unmistakability doctrine is a canon of construction which provides that a contract will not be interpreted to surrender sovereign power unless it does so in unmistakable terms. See *Winstar Corp.*, 518 U.S. at 871-72. First, just like the reserved powers doctrine, the unmistakability doctrine applies to the interpretation of contracts, not constitutions. See *id.* The defendants cite no case in which the unmistakability doctrine has been used to interpret a constitutional provision. Second, as discussed above, the Pension Protection Clause imposes only a financial obligation. It

does not surrender the State's sovereign powers. Accordingly, the unmistakability doctrine has no application here. *Ahmad*, 2014 IL App (1st) 123629, ¶¶ 85-86 (unmistakability doctrine has no application where contract did not surrender police powers). Third, to the extent the defendants argue that the Pension Protection Clause surrenders a "police power" to reduce pension benefits, the language of the Pension Protection Clause ("shall not be diminished or impaired") is "plain" (see *Kanerva*, 2014 IL 115811, ¶ 41) and unmistakable. Finally, the "unmistakability doctrine does not allow governments to undertake actions that are *specifically* aimed at voiding a contract or preventing performance of a contract." *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 712 F.3d 761, 773 (2d Cir. 2013) (emphasis in original). Since the entire point of the Act is to diminish pension benefits, the unmistakability doctrine cannot be used to justify it.

IV. THE ACT IS INSEVERABLE.

The Act's overriding purpose was the diminishment of pension benefits. The provisions effecting that unconstitutional goal are inextricably linked with all of the Act's remaining terms. Accordingly, the Act is inseverable and void in its entirety.

The defendants' contention that the presence of a severability clause in the Act renders the Act severable (see Def. Br. at 48) rings hollow. Indeed, in the circuit court, the defendants relegated their severability argument to a footnote, and did not even bother to identify purportedly severable provisions. (R. C2225 n.7.)

This Court has repeatedly refused to sever unconstitutional provisions from other provisions in the same legislation notwithstanding the presence of a severability clause. See *Cincinnati Ins. Co. v. Chapman*, 181 Ill. 2d 65, 81-86 (1998); see also *Best*, 179 Ill. 2d at 459-67. A severability clause is "not conclusive" of the issue of severability. *Best*,

179 Ill. 2d at 460. In fact, "[b]ecause of the very frequency with which it is used, the severability clause is regarded as little more than a mere formality." *Id.* at 461 (quoting 2 N. Singer, Sutherland on Statutory Construction §44.08, at 521 (5th ed. 1993)). Notwithstanding the presence of a severability clause, an act is inseverable where it constituted a broad legislative package intended to impose sweeping changes in a subject area, and where the unconstitutional provisions of that package were important elements of it. *Best*, 179 Ill. 2d at 464-67 (legislation was "intended to effectuate comprehensive reform of the current tort system in Illinois," and the unconstitutional provisions were "core provisions" that provided the "measures by which" the legislation's goals would be achieved); *Chapman*, 181 Ill. 2d at 82-86 (legislation was intended "to provide a *total* redistricting package," and that goal could not be achieved without the unconstitutional provisions) (emphasis in original).

That is precisely the situation here. Both the Act and its legislative history make abundantly clear that the overriding purpose of the Act was to diminish pension benefits. As Senator Raoul commented, the Act's provisions were needed to "finally break the political stalemate." See 98th Ill. Gen. Assem., Senate Proceedings, Dec. 3, 2013, at 3 (SA 39). "Some provisions were sought by House Democrats, some were sought by House Republicans, some sought by Senate Republicans, and some sought by the Senate Democrats." *Id.*, at 4 (SA 40). "All told, the provisions in this bill are all part of an integral bipartisan package," Senator Raoul explained. *Id.*; see also, *e.g.*, *id.*, at 19 (SA 44) (the Act's restrictions on collective bargaining, entitled "Duty to bargain regarding pension amendments," were intended to ensure that "the things achieved by this bill cannot be undone by way of collective bargaining").

The entire purpose of that legislative package was to save the State money by diminishing pension benefits, particularly by diminishing the automatic annual increases codified in the Pension Code. See Public Act 98-0599, §1 (SA 63-65) (legislative statement); see also 98th Ill. Gen. Assem., House Proceedings, Dec. 3, 2013, at 7 (SA 61) (remarks of Speaker Madigan) (stating that "the 3 percent compounded" AAI has "been identified as the chief cause of the financial problem" addressed by the Act). The AAI diminishment provisions were so important to the Act's operation, in fact, that the "severability and inseverability" clause deems them inseverable from pension funding provisions. See, *e.g.*, Public Act 98-0599, §97 (SA 388-89) (amendments to Pension Code reducing AAI and requiring AAI skips, sections 2-119.1(a-1) and (a-2), 14-114, 15-136(d-1) and (d-2), and 16-133.1, are inseverable from funding "guarantee" amendments to Pension Code, sections 2-125, 14-132, 15-156 and 16-158.2). The unconstitutional pension diminishments thus are inseparable from the Act's other provisions, and clearly the other provisions would not have been enacted without them. *Best*, 179 Ill. 2d at 460 (legislation is inseverable where valid and invalid provisions are mutually connected with and dependent on each other such as to warrant the belief that the legislature intended them as a whole).

Moreover, attempting to salvage valid pieces of this puzzle would be an exercise in futility, particularly since the defendants likewise concede that all of the Act's provisions "advance substantially the same basic objective." (Def. Br. at 48.) The Act's severability provision states that the Act's changes to 39 distinct sections and subsections of various statutes "are mutually dependent and inseverable from one another," but that those 39 provisions are "severable from any other provision of this Act," which is

generally severable. See Public Act 98-0599, §97 (SA 388-89). That list of 39 inseverable provisions includes some, but not all, of the provisions that unconstitutionally diminish pension benefits and have been challenged in this litigation. In fact, the defendants expressly concede that "some provisions outside the inseverability clause would fall if this Court affirms the circuit court's decision because the State's only defense of them relies on the State's police powers." (Def. Br. at 49 n.6.) In other words, if this Court agrees with the circuit court that the police powers defense is invalid, more than 39 of the Act's provisions must be invalidated.

Simply put, once pension diminishments *and* pension funding provisions have been invalidated, whatever remains bears no resemblance to the Act that the General Assembly actually enacted, and the entire Act is therefore void. *Best*, 179 Ill. 2d at 462 ("[T]he entire act will be declared void if, after striking the invalid provisions, the act that remains does not reflect the legislative purpose in enacting the legislation"). "Any attempt by this court to retain only bits and pieces of this dramatic legislation would do violence to the legislative intent," *Chapman*, 181 Ill. 2d at 85, and would, in effect, create "another piece of legislation that the legislature cannot be presumed to have intended to enact," *Best*, 179 Ill. 2d at 467. Under these circumstances, "[t]he new law would be created by this court and not by the General Assembly, because it enacted a different one." *Id.* (quoting *Commercial Natl. Bank of Chicago v. City of Chicago*, 89 Ill. 2d 45, 75 (1982)). That would be contrary to the Constitution and to numerous decisions of this Court. *Id.*

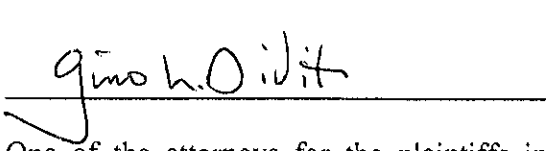
The circuit court was therefore correct to find the Act inseverable.

CONCLUSION

The Pension Protection Clause protects public servants in Illinois against diminishment or impairment of their constitutionally-promised pension benefits. The Clause was intended, above all, to insulate public pensions from the danger that government employers would claim that funding shortfalls or other fiscal exigencies required benefit diminishments or impairments, as the defendants do here. Public Act 98-0599 violates both the letter and the purpose of the Clause. Accordingly, for all of the reasons stated above, the plaintiffs respectfully request that this Court affirm the judgment of the circuit court in its entirety.

Date: February 16, 2015

Respectfully submitted,



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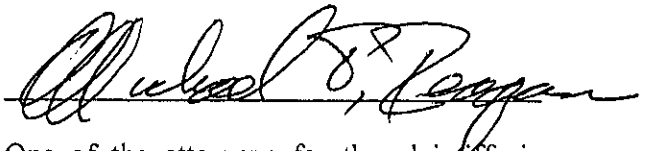

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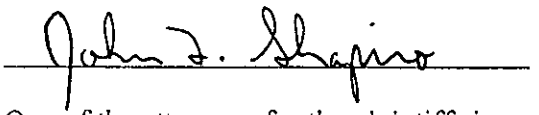

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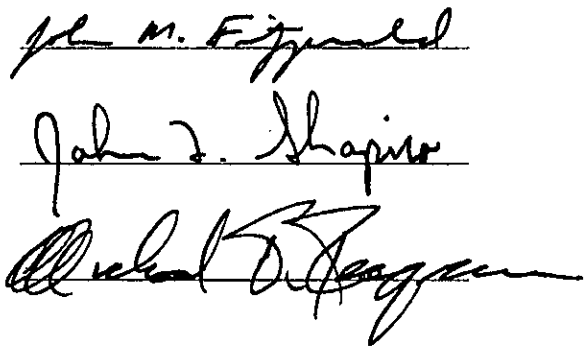
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

Date: February 16, 2015



CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on February 16, 2015, he caused the Notice of Filing, the required number of copies of the Brief of *ISEA*, *RSEA*, *Heaton* and *Harrison* Plaintiffs-Appellees and of the Separate Supplemental Appendix of *ISEA*, *RSEA*, *Heaton* and *Harrison* Plaintiffs-Appellees, and a CD containing the brief and the separate supplemental appendix in Adobe Acrobat format, to be served upon the following individuals by FedEx overnight delivery.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.